No. 6771

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco 3-24-32—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

No. 18910-L

UNITED STATES OF AMERICA,

Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant and Appellee.

NAMES AND ADDRESSES OF ATTORNEYS.

GEO. J. HATFIELD, U. S. Attorney,
LUCAS E. KILKENNY, Assistant U. S. Attorney,
Post Office Bldg.,
San Francisco, Calif.,
Attorneys for Plaintiff and Appellant.

HENLEY C. BOOTH, Esq.,
A. G. GOODRICH, Esq.,
65 Market St.,
San Francisco, Calif.,
Attorneys for Defendant and Appellee.

In the District Court of the United States for the Northern District of California.

Division.

No. 18910-L

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

SOUTHERN PACIFIC COMPANY,

Defendant.

COMPLAINT FOR VIOL. SAFETY APPLIANCE ACT.

Now comes the United States of America, by Geo. J. Hatfield, United States Attorney for the Northern District of California and brings this action on behalf of the United States against the Southern Pacific Company, a corporation organized and doing business under the laws of the State of Kentucky, and having an office and place of business at San Francisco in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. [1*]

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the

*Page-number appearing at the foot of page of original certified Transcript of Record.

Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

> IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

defendant, on November 10, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of ten cars, drawn by locomotive engine No. 1198, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Mission Bay yard to Sixth street yard, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent

of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [2]

FOR A SECOND CAUSE OF ACTION plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

> IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated

> by the engineer of the locomotives drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated,

defendant, on November 11, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of 26 cars, drawn by locomotive engine No. 1159, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Sixth street yard to Mission Bay yard, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [3]

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier

engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

> IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated,

defendant, on November 12, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of 20 cars, drawn by locomotive engine No. 1198, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Sixth street yard to Mission Bay yard, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [4]

FOR A FOURTH CAUSE OF ACTION plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the Interstate Commerce Commission of June 6, 1910,

which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

> IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated,

defendant, on November 13, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of 8 cars, drawn by locomotive engine No. 1202, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Mission Bay yard to Berry street, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [5]

FOR A FIFTH CAUSE OF ACTION plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

> IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together

with the 85 per cent shall have their brakes so used and operated,

defendant, on November 13, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of 13 cars, drawn by locomotive engine No. 1198, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Sixth street yard to Mission Bay yard, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [6]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of Five Hundred dollars and its costs herein expended.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Feb. 7, 1931. [7]

(Title of Court and Cause.)

The President of the United States of America
To SOUTHERN PACIFIC COMPANY, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR AND ANSWER the Complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the Northern District of California, Southern Division, within ten days after the service on you of this Summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said Plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract or it will apply to the Court for any other relief demanded in the Complaint.

WITNESS the Honorable Harold Louderback, Judge of said District Court, this 7th day of February in the year of our Lord one thousand nine hundred and thirty-one and of our independence the one hundred and fifty-fifth.

(Seal) WALTER B. MALING,
Clerk.
By Lyle S. Morris,
Deputy Clerk.

[Endorsed]: Filed Feb. 10, 1931. [8]

(Title of Court and Cause.)

ANSWER OF DEFENDANT.

Comes now the defendant above named and for answer to plaintiff's complaint filed herein, admits, denies and alleges as follows, to wit:

FIRST CAUSE OF ACTION.

I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office, and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the plaintiff's complaint or in violation of the order of the Interstate Commerce Commission referred to in said complaint, the [9] defendant on November 10, 1930, operated on its lines of railroad one train, to wit: its own transfer consisting of ten or any number of cars drawn by Locomotive Engine No. 1198, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce.

III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over

its or any line of railroad from Mission Bay Yard to Sixth Street Yard at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred Dollars ($100) or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said first cause of action, defendant alleges:

I.

That on November 10, 1930, it hauled on its line of railroad certain cars drawn by Locomotive Engine No. 1198 from Mission Bay Yard to Sixth Street Yard at San Francisco [10] in the State of California; that the said movement was solely a switching movement between yards less than 3000 feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely

for the purpose of picking up and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used or operated by the engineer of said locomotive engine.

SECOND CAUSE OF ACTION.

I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the plaintiff's complaint or in violation of the order of the Interstate Commerce Commission referred to in said complaint, the defendant on November 11, 1930, operated on its lines of railroad one train, to wit: its own transfer consisting of twenty-six or [11] any number of cars drawn by Locomotive engine No. 1159, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce.

III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over its or any line of railroad from Sixth Street Yard to Mission Bay Yard at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred ($100) Dollars or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said second cause of action, defendant alleges:

I.

That on November 11, 1930, it hauled on its line of railroad certain cars drawn by Locomotive Engine No. 1159 from Sixth Street Yard to Mission Bay Yard at San Francisco [12] in the State of California; that the said movement was solely a switching movement between yards less than 3000

feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely for the purpose of picking up and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used or operated by the engineer of said locomotive engine.

THIRD CAUSE OF ACTION.

I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the plaintiff's complaint or in violation of the order of the Interstate Commerce Commission referred to in said complaint, the defendant on November 12, 1930, operated on its lines of railroad one [13] train, to wit: its own transfer consisting of twenty or

any number of cars drawn by Locomotive engine No. 1198, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce.

III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over its or any line of railroad from Sixth Street Yard to Mission Bay Yard at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred Dollars ($100) or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said third cause of action, defendant alleges:

I.

That on November 12, 1930, it hauled on its line of railroad certain cars drawn by Locomotive En-

gine No. 1198 [14] from Sixth Street Yard to Mission Bay Yard at San Francisco in the State of California; that the said movement was solely a switching movement between yards less than 3000 feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely for the purpose of picking up and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used or operated by the engineer of said locomotive engine.

FOURTH CAUSE OF ACTION.

I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the plaintiff's complaint or in violation of the order

of the Interstate Commerce Commission referred to in said complaint, the defendant on November 13, 1930, operated on its lines of railroad one train, to wit: its own transfer consisting of eight or any number of cars drawn by Locomotive Engine No. 1202, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce. [15]

III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over its or any line of railroad from Mission Bay Yard to Berry Street at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred Dollars ($100) or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said fourth cause of action, defendant alleges:

I.

That on November 13, 1930, it hauled on its line of railroad certain cars drawn by Locomotive Engine No. 1202 from Mission Bay Yard to Berry Street at San Francisco in the State of California; that the said movement was solely a switching movement between yards less than 3000 feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely for the [16] purpose of picking upon and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used or operated by the engineer of said locomotive engine.

FIFTH CAUSE OF ACTION.

I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the

plaintiff's complaint or in violation of the order of the Interstate Commerce Commission referred to in said complaint, the defendant on November 13, 1930, operated on its lines of railroad one train, to wit: its own transfer consisting of thirteen or any number of cars drawn by Locomotive Engine No. 1198, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce. [17]

III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over its or any line of railroad from Sixth Street Yard to Mission Bay Yard at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred Dollars ($100) or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said fifth cause of action, defendant alleges:

I.

That on November 13, 1930, it hauled on its line of railroad certain cars drawn by Locomotive Engine No. 1198 from Sixth Street Yard to Mission Bay Yard at San Francisco in the State of California; that the said movement was solely a switching movement between yards less than 3000 feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely [18] for the purpose of picking up and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used and operated by the engineer of said locomotive engine.

WHEREFORE, the defendant prays that the plaintiff take nothing by said action and that the defendant be discharged, with its costs.

H. C. BOOTH,
A. G. GOODRICH,
Attorneys for Defendant. [19]

State of California,
City and County of San Francisco.—ss.

G. L. King, being first duly sworn, deposes and says:

That he is an officer, to wit: Assistant Secretary,

of Southern Pacific Company, the defendant in the within entitled action, and makes this verification for and on its behalf; that he has read the within and foregoing answer, knows the contents thereof, and the same is true of his own knowledge, except as to those matters and things therein stated on information and belief, and as to those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 13th day of March, 1931.

(Notarial Seal) FRANK HARVEY,
Notary Public in and for the City and County of San Francisco, State of California.

Service of the within Answer is admitted this 13th day of March, 1931.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 13, 1931. [20]

(Title of Court and Cause.)

STIPULATION WAIVING JURY TRIAL.

IT IS HEREBY STIPULATED by and between the respective parties to the above-entitled action, through their respective counsel, that trial by jury

of the said action be and the same is hereby expressly waived.

Dated: June 16, 1931.

GEO. J. HATFIELD,
Geo. J. Hatfield,
United States Attorney,
(Attorney for Plaintiff)
A. G. GOODRICH,
(Attorney for Defendant)

[Endorsed]: Filed Jun. 17, 1931. [21]

(Title of Court and Cause.)

OPINION.

NORCROSS, District Judge:

This is an action under the Safety Appliance Acts, 45 U. S. C. A., Sec. 1 et seq. The complaint alleges five causes of action based on five transfer movements of cars made during September, 1930, between the Mission Bay unit and the Sixth Street unit of defendant's yard in San Francisco. The movements consisted of 10, 26, 20, 8 and 13 cars, respectively, and in each instance the air brakes were not under the control of the enginemen due to the air hose being disconnected.

The Mission Bay unit and the Sixth Street unit are within an area less than 4,000 feet square. The two units are connected by a line of track paralleling Seventh Street on the southwest side of defendant's yard for a distance of [22] approximately 2500 feet,

the total length of the line being approximately 4,000 feet between the terminal points where it connects with the assemblage of switching and classification tracks of the respective units.

The line in question does not directly connect with the main line of defendant which parallels it along Seventh Street. With the exception of six yard switch connections along Seventh Street it does not cross any other track of defendant or that of any other railroad. Between the two units the track crosses eight public streets at grade, the majority of which are protected by crossing watchmen during daylight hours. Upon none of the streets so crossed are street car lines.

In none of the movements complained of were any cars picked up or set out en route, and in each instance the assemblages of cars moved as a unit, the switching necessary to make up or break up these transfer movements being done before the transfer started on its journey or after arrival at destination. These movements were wholly within yard limits, and were made by yard engines and yard crews and under the direction of the yardmaster. Two of the five movements were made by the locomotives pushing the cars.

~~In so far as the question of hazard is an element in cases of this character the evidence is without conflict that because of the necessity of slow speed in the movements in question the hazard would not be reduced by utilizing the air brake appliances, but upon the contrary would be increased.~~

The question of law presented is whether the movements of cars as above described were train movements within the meaning of the statute, or mere switching movements.

In support of plaintiff's contention that these were train movements the following cases are cited: United States [23] v. Erie R. R. Co., 237 U. S. 402; United States v. Chicago B. & Q. R. R. Co., 237 U. S. 410; Louisville & Jeffersonville Bridge Co. v. United States, 249 U. S. 534; United States v. Northern Pacific Ry. Co., 254 U. S. 251; Great Northern Ry. v. United States, 288 Fed. 190; Illinois Cent. R. Co. v. United States, 14 Fed. (2d) 747; Chicago, St. P., M. & O. Ry. Co. v. United States, 36 Fed. (2d) 670.

In the Erie case cited the "transfer trains" under consideration moved from Jersey City and Weehawken to Bergen, and vice versa. "They were made up in yards like other trains and then proceeded to their destinations over main line tracks used by other freight trains, both through and local. They were not moving cars about in a yard or on tracks set apart for switching operations, but were engaged in main line transportation * * * over switches leading to other tracks and across passenger tracks whereon trains were frequently moving."

In the Chicago, Burlington & Quincy case there was presented the question of movements of cars at Kansas City between two freight yards "on oppo-

site sides of the Missouri River, the distance between their nearest points being about two miles. The track connecting them is one by which passenger and freight trains enter and leave the city, in other words, a main-line track. For a distance of 3,000 feet it is upon a single track bridge spanning the river, and off the bridge it intersects and passes through the Union Depot tracks. Besides its use by the defendant's trains, a considerable portion of it is also the line by which the passenger trains and some of the freight trains of the Rock Island and Wabash railroads enter and leave the city."

In the Louisville & J. Bridge Co. case the cars were [24] assembled in the yard of the Bridge Company "preparatory to their transfer westerly and delivery into the Illinois Central yard. * * * the cars entered upon a track of the Illinois Central Railroad Company, used as a main line by both the Big Four and the Chesapeake & Ohio companies. * * * ".

In the Northern Pacific case the cars were moved upon a line used by two independent companies "for freight trains under air control and the passenger trains of another company cross it."

In the Great Northern case the twenty-four cars there involved "were pushed by an engine from this point ("P" yard) to a point west of Lyndale Avenue Bridge known as the 'Hay' yard north of the main tracks. To reach this place they moved east from the 'P' yard; crossed the east line main track

to the west line main track, and proceeded east on this track to the lead at the 'Hay' yard where the cars were distributed to certain industries and delivery tracks."

In the Illinois Central case the track in question in addition to crossing certain streets at grade, crossed "some switch tracks of the Chicago & St. Paul Railroad at Fourteenth Street, and the Missouri Pacific tracks at California Street; also that a portion of this track * * * was jointly used by defendant and the former road."

The Chicago, St. Paul, M. & O. Ry. Co. case involved the movement of sixteen cars as a unit by a locomotive used for switching purposes from the south part of its yards in Omaha north, a distance of one and one-fourth miles to where the railroad's freight trains were commonly made up. "Four city streets used by the public were crossed, and two tracks of other railroads, not used for main line traffic, were crossed. The track over which the movement was made was a [25] lead from the interchange track, on which the cars were assembled, to the north yard." During the movement in question "one stop was made at a railroad crossing."

The Chicago, St. Paul, etc. Co. case last referred to, upon the facts is more nearly like the case at bar than any of the others cited. In that case, however, there is the important distinction that two tracks of other railroads were crossed and one stop required to be made before making such crossing.

Commenting on the facts involved in the Erie case the Supreme Court said:

> "They were made up in yards like other trains and then proceeded to their destination over main line tracks used by 'other freight trains, both through and local. They were not moving cars about in a yard or on tracks set apart for switching operations,' * * *."

In the case at bar the movements were within a single yard between two units thereof and on a track having no connection with any but switching tracks. They were upon a track in fact set apart for switching operations.

In the Louisville & J. Bridge Co. case the court said:

> "The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it can not, therefore, with propriety be called a switching movement."

While in the case at bar the movement of cars between the two units of the yard was a transfer of the cars as a [26] unit, such transfer was not "from one terminal into that of another company for delivery," and, also, did not involve "a main line track movement."

It is important to note that in the last mentioned case the court further said:

> "This is not only a train movement but it would be difficult to imagine one in which the control of the cars by train brakes would be more necessary, in order to secure that safety of employees, of passengers and of the public which it is the purpose of the act to secure, * * *."

In the Northern Pacific Co. case the Supreme Court said:

> "A moving locomotive with cars attached is without the provisions of the act only when it is not a train; as where 'the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains'."

From this it does not necessarily follow that a movement of cars as in the case at bar is a train within the meaning of the statute where such movement is on a line which has no other connections except with switching tracks and which line in purpose and reality is but an extension of such switching tracks.

In the Great Northern case the court said:

> "The mere fact that the Railroad Company designates a large stretch or tract as yard does not make every operation therein a switching operation. If so, the act could be avoided by including large areas in the term yard."

The two portions of the yard designated units in the case at bar present quite a different situation

than is presented in the Great Northern case. The question whether it be a train or a switching movement must be determined by [27] the peculiar facts of each case. If the entire movement is within a designated yard that is a fact to be considered with other pertinent facts. As said in the Illinois Central case:

> "The decisions turn upon the particular facts of each case. All of them contain many varying and conflicting factors, no one of which alone is controlling."

The opinion of the Supreme Court in the Chicago, Burlington and Quincy case is illuminating. From it we quote the following:

> "The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passengers and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect. * * * Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather

than in the names applied to those engaged in it."

As said by the Circuit Court of Appeals of this Circuit in Hill v. Carter, 47 Fed. (2d) 869, 871:

> "In considering * * * the extent that any decision may be considered as controlling or an authority upon a particular question presented for determination in an instant case, it is well always to have in view the [28] maxim never better expressed than in the language of Chief Justice Marshall in the celebrated case of Cohens v. Virginia, 6 Wheat. 399, 5 L. Ed. 257: 'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. * * *.' "

The conclusion reached upon the facts presented in the case at bar is that "the essential nature" of the movements in question was switching, and not train movements.

Judgment for defendant.

FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed Nov. 27, 1931. [29]

(Title of Court.)

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 27th day of November, in the year of our Lord one thousand nine hundred and thirty-one.

PRESENT: the Honorable Harold Louderback, District Judge.

United States of America,

vs. No. 18910

Southern Pacific Company

This case, having heretofore been tried before and submitted to the Hon. Frank H. Norcross, now being fully considered, it is Ordered that Judgment be entered in favor of the defendant in accordance with a memorandum opinion of the Hon. Frank H. Norcross, this day filed. [30]

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that in the opinion rendered in the above entitled case by Honorable Frank H. Norcross, filed November 27, 1931, in the office of the Clerk of said Court, the following paragraph appeared:

"In so far as the question of hazard is an element in cases of this character the evidence is without conflict that because of the necessity of slow speed in the movements in question the hazard would not be reduced by utilizing the air brake appliances, but upon the contrary would be increased."

IT IS FURTHER STIPULATED that on the 14th day of December, 1931, the Honorable Frank H. Norcross, Judge of the above entitled Court, sent the following letter to the Clerk of said Court:

"Walter B. Maling, Esq., December 14th,
Clerk United States District Court, 1931
San Francisco, California.

Re: United States v.
Southern Pacific Co.
No. 18910-L.

Dear Mr. Maling:

Upon again reviewing the decision in the above mentioned case filed by you on November 27th last I have decided to correct the same by eliminating on [31] page 2 of the opinion the following statement:

'In so far as the question of hazard is an element in cases of this character the evidence is without conflict that because of the necessity of slow speed in the movements in question the hazard would not be reduced by utilizing the air brake appliances, but upon the contrary would be increased.'

You are authorized to delete from the opinion the foregoing paragraph, and this letter will

be regarded as your authority for so doing.
With kindest regards,
Sincerely yours,
(Sgd) FRANK H. NORCROSS."

Dated this 29th day of December, 1931.
GEO. J. HATFIELD,
United States Attorney,
LUCAS E. KILKENNY,
Assistant U. S. Attorney,
Attorneys for Plaintiff.
HENLEY C. BOOTH,
A. G. GOODRICH,
Attorneys for Defendant.
[Endorsed]: Filed Dec. 29, 1931.

In the Southern Division of the United States District Court for the Northern District of California.
No. 18910-L.
THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant.

JUDGMENT.

This cause having come on regularly for trial upon the 30th day of July, 1931, before the Court sitting without a Jury, a trial by Jury having been

waived by written stipulation filed: L. E. Kilkenny, Assistant United States Attorney, appearing as attorney for plaintiff, and Henley C. Booth and A. G. Goodrich, Esquires, appearing as attorneys for defendant, and the trial having been proceeded with on the 31st day of July, and oral and documentary evidence having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having rendered its decision and ordered that judgment be entered herein in favor of defendant, together with costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, and that defendant go hereof without day, and that said defendant do have and recover of and from said plaintiff, its costs herein expended taxed at $

Judgment entered this 27th day of November, 1931.

WALTER B. MALING,
Clerk. [33]

(Title of Court and Cause.)

STIPULATION AND ORDER EXTENDING TIME WITHIN WHCH TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between the parties to the above entitled action that the

plaintiff, The United States of America, may have to and including the 2nd day of January, 1932, within which to prepare, file and serve its proposed bill of exceptions in the above entitled cause.

Dated: December 3, 1931.

A. G. GOODRICH,
Attorney for Defendant.
GEO. J. HATFIELD,
United States Attorney,
Attorney for Plaintiff.

It is so ordered:

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Dec. 3, 1931. [34]

(Title of Court and Cause.)

PLAINTIFF'S BILL OF EXCEPTIONS.

The above entitled cause came on for trial before Honorable Frank H. Norcross, one of the judges of the above named court, at the Federal Building in San Francisco, California, on the 30th day of July, 1931.

There were present and appearing, Geo. J. Hatfield, United States Attorney, and L. E. Kilkenny, Assistant United States Attorney, on behalf of the plaintiff; and Mr. H. C. Booth and Mr. A. G. Goodrich, on behalf of the defendant.

The parties had theretofore, by written stipulation duly filed, waived trial by jury, and had agreed

to submit this cause to the Court.

Opening statements were made by Mr. Kilkenny on behalf of the plaintiff, and by Mr. Booth on behalf of the defendant.

Thereupon the following proceedings were had:

Mr. KILKENNY. Will it be stipulated by counsel that the Southern Pacific Company is a common carrier?

Mr. BOOTH. Yes.

Mr. KILKENNY. I have here a map that has been prepared by the Southern Pacific Company. Will it be stipulated that this may be introduced in evidence at the present time as being a true representation of the location of the tracks [35] over which the movements alleged in the complaint were made on the dates specified, and of the location of the various streets crossed, of the relative location of the yards between which the movements were made?

Mr. BOOTH. We will so stipulate, except that we do not stipulate that the movements were made between yards. They were made between a number of tracks shown on the map, in the neighborhood of Sixth Street, and between Townsend and Berry Streets, in San Francisco, and a number of tracks which the evidence will afterwards show are used for classifying cars, and which are commonly referred to as Mission Bay. It is our contention in this case that they were all a part of the San Francisco yard, and that it was not an inter yard movement.

(Testimony of Frank F. Engles)

Mr. KILKENNY. The stipulation, with that qualification will be satisfactory. We offer this map in evidence at this time.

Mr. BOOTH. And it may be more convenient for the Court to have a duplicate copy to examine on the bench. I have another one here, and with the permission of your Honor I will hand it up.

(The map was here marked "Plaintiff's Exhibit 1.")

Mr. KILKENNY. Will it be stipulated by counsel that the movements alleged in the complaint were made over the line that is represented in green color on the map; is that correct?

Mr. BOOTH. That is correct.

FRANK F. ENGLES was thereupon called as a witness for plaintiff, who, being first duly sworn, testified as follows:

I am an inspector for the Interstate Commerce Commission; have been such since October, 1914, continuously up to the present time. My duties are to inspect safety appliances on railroad [36] equipment; to investigate accidents; to observe the violation of laws in the movement of equipment, as I did in this case. My duties were the same on November 10, 11 and 12, 1930.

Prior to entering the Government service I had

(Testimony of Frank F. Engles)

25 years' railroad experience, about 3 years as a brakeman, and about 22 years as a conductor and yardmaster; as a yardmaster about 9 years.

In course of my duty as inspector of safety appliances I made inspections in the yard of the Southern Pacific Company in San Francisco on November 10, 11 and 12, 1930. Inspector Hamilton was with me at these times.

On November 10, 1930, I observed a movement of cars of the Southern Pacific Company on tracks here in San Francisco; this was a movement at 10:05 A. M. by engine 1198 from the Mission Bay Yard to the Sixth Street yard.

Mr. BOOTH. Now, if the Court please, I don't want to interrupt the testimony of the witness, but we object to the witness characterizing these yards as yards, or these assemblies of tracks as yards, unless he knows they are yards.

Mr. KILKENNY. We will bring out what he means by that expression.

Mr. BOOTH. All right.

(Witness continuing):

By the term "Mission Bay Yard", I mean Mission Bay Yard as I understand it in my regular inspection work. I have made inspections there in this yard, in company with railroad officials of the car department, and they have designated to me this yard as Mission Bay Yard. It is located between the Sixteenth Street yard, or Sixteenth Street

(Testimony of Frank F. Engles)

viaduct, and I would call it the River Slip—a number of spur tracks that extend northward from Sixteenth Street, if I am correct in my directions. Referring to Plaintiff's Exhibit No. 1, what I mean by Mission Bay Yard is (indicating) this section of tracks that extend from Sixteenth Street in a general northerly direction; that is what was designated to me in my regular inspection work as the Mission Bay Yard, a strip or number of tracks that parallel Third Street. This strip of tracks is probably 500 or 600 feet wide or more; generally they run in a northerly and southeasterly direction; that is what I refer to as Mission Bay Yard.

(Thereupon, the part referred to as Mission Bay Yard was indicated by counsel by the letter "A"). [37]

Referring to this Exhibit, what I mean by the Sixth Street yard, are these tracks (indicating) extending in a northeasterly direction from Sixth Street, between Townsend and Berry Streets, extending clear up to Third Street.

(Thereupon, the part last referred to by the witness was indicated by counsel by the letter "B".)

At the time these movements I have spoken of were made, the tracks indicated by the letter "A" were used for the purpose of assembling cars into trains, and transfers, etc., and for the purpose of assembling cars, I presume, for loading at different industries. It is called the make-up and break-up

(Testimony of Frank F. Engles)

yard. When I say industries, I refer to some warehouses along Third Street. Down at the channel, marked "Channel" on this Exhibit, they frequently load bananas from boats onto refrigerator cars. The channel is a strip of water that runs in a northeasterly and southwesterly direction; boats come in there.

After the arrival of the train movement at the point indicated by the letter "B", the train was broken up and placed at different points. Some of the cars were placed in what is known as the freight sheds—outbound and incoming freight sheds; others were placed at various tracks in that vicinity after arrival at Sixth Street.

The first movement, which was made on Nov. 10, 1930, consisted of a continuous line of cars hauled by the locomotive; this movement originated in the area marked "A"; while I don't know that I can indicate the exact location, it was somewhere north of the Sixteenth Street viaduct; I would say it began about 300 feet north of Sixteenth, and about 400 or 500 feet west of Third Street, as near as I can judge from this Exhibit. It moved over the tracks indicated by green colors; the tracks indicated by red colors are the main tracks over which passenger trains are moved in a southerly direction toward Los Angeles; no freight trains move over that line, so far as I have seen. During this movement over the green line, no cars were set out or picked up.

(Testimony of Frank F. Engles)

This Exhibit shows a number of streets; Barstow, Baggett, Hubbell, Irwin and Hooper Streets; they cross at grade the tracks indicated by green and red colors; I think five or six crossings were protected by flagmen. These were all where streets crossed. [38]

The movement on November 10th consisted of locomotive 1198 and 10 cars; the air brakes on these 10 cars were not under the control of the engineer; the air hose between the locomotive and head car in the train next to the locomotive was not coupled together; each of the 10 cars was equipped with air brakes; the locomotive was equipped with appliances for operating the air brakes on the cars.

I rode that train during that movement; after this assembly of cars entered the section marked "B", it stopped, with the engine being then at Sixth Street, after which the assembly or line of cars were broken up, and the cars were placed on different tracks, different cars on different tracks. I estimated this movement at approximately a mile; that was my judgment.

As to the movement on November 11, 1930, that began at 1:50 P. M. That was from the Sixth Street yard to the Mission Bay Yard, the reverse of the other movement. It consisted of locomotive 1159 and 26 cars. I also rode that movement; no cars were picked up or set out during the movement. All the 26 cars were equipped with air brakes and the locomotive was equipped with contrivances for operating the air brakes on these cars; but the

(Testimony of Frank F. Engles)

engineer could not operate the air brakes on the cars, because the air hose was not coupled between the locomotive and head car in the train. The distance over which this movement was made was approximately a mile; it crossed the same street crossings as the other movement, except in the opposite direction; I would judge that the traffic conditions were about the same; some of those streets are not used frequently by traffic; there is one street, which I think is called Sixteenth Street, that seems to be a through street that leads down to the Bay, and that is pretty well occupied by traffic; this traffic is mostly trucks; some pleasure cars. These movements crossed Sixteenth Street. There is a viaduct over the tracks at Sixteenth Street, and there is also a highway that leads under the viaduct; vehicles can either cross the railroad tracks at grade or over the viaduct. After this movement entered Mission Bay Yard, we did not watch it any further.

I also observed movement of cars in that same area on November 12, 1930; it took place at 3:00 P. M. and consisted of engine 1198 and 20 cars; it moved from the Sixth Street yard to the Mission Bay Yard, the same direction as the movement on the 11th. All cars were equipped with air brakes and the locomotive with equipment for operating air brakes; the air hose was not coupled between the locomotive and head car, so that the air brakes on the cars could not be operated. In this case, the

(Testimony of Frank F. Engles)

train was pushed ahead of the locomotive. We did not watch this train afer it arrived in the Mission Bay Yard, and I do not know where the cars [39] were broken up, but it was after the line of cars had crossed Sixteenth Street. I also rode this train during the course of that movement.

I also saw a movement of cars on November 13; it consisted of locomotive 1202 and 8 cars; it began at 10:10 A. M. and was from Mission Bay Yard to the Sixth Street Yard; it was from approximately the region of the crossing of Sixteenth Street at the viaduct to the neighborhood of Sixth Street, in the region marked "B" in Exhibit No. 1. During the course of this movement no cars were picked up or set out. All the cars were equipped with air brakes, but they could not be operated by the engineer because the air hose was not coupled between the locomotive and the head car. I rode this movement the whole way; it was broken up in the area marked "B", after the cars had reached Sixth Street.

I also observed another movement that day, consisting of locomotive 1198 and 13 cars, from the Sixth Street Yard to Mission Bay Yard, beginning at 2:16 P. M., which I also rode. No cars were set out or picked up. All cars were equipped with air brakes, but they could not be operated as the air hose was not coupled between the locomotive and the head car. This line of cars was pushed ahead of the locomotive.

(Testimony of Frank F. Engles)

From a casual observation, I did not notice much difference in the traffic; it was about the same on all occasions.

I did not notice any difference in the number of flagmen that were stationed at the crossings on any of these occasions. I believe those are stations that have men at them, at these crossings during certain hours of the day. I do not know positively when they were on duty, but I would say from 8:00 A. M. to 6:00 P. M. There is a sign on each flagman's cabin that indicates the hours that he is on duty and the hours that he is not there. It is my recollection that they were wherever it was indicated they should be on duty between those hours.

The various movements, I believe, crossed eight streets at grade. In the case of the movement from the area indicated by "B" they would also cross Sixth Street, making 9 crossings. On each occasion when the movement was going toward Mission Bay it started across Sixth Street; and when the movements were made in the reverse direction, they stopped short of Sixth Street.

On each of the occasions the length of the movement was approximately the same. [40]

CROSS-EXAMINATION.

As to the speed of these movements, I made a note of the time they departed and the time they arrived. The movement on the 11th left Sixth Street at 1:50 P. M.; arrived at Mission Bay Yard

(Testimony of Frank F. Engles)

at 2:10 P. M.; an interval of 20 minutes that would be at the rate of three miles an hour; they did not consume all of that time in making the movement; they may have been stopped en route. The engineers would stop these movements with the locomotive and tender brakes. Whether or not it would be a difficult matter to stop a train at a speed of five or six miles an hour on a level track with those brakes would depend on circumstances. I would say that these transfers were operated between five and ten miles an hour. I would not say exactly five miles an hour; they may have exceeded that, or they may not, in some instances.

The type of the locomotives used is what is classified as a switch engine; this is an engine that is customarily used by the Southern Pacific and other railroads in handling cars for the making up and breaking up of trains, called the classification of cars, and the spotting of cars at industry locations, and the taking away of cars from industries. They are equipped a little differently from the so-called road engine which is sent out with a freight or passenger train after that train has been made up; the constructions may be a little different; they are not entirely used as road engines. Still, I have seen a great many road engines used in switching service, engines that were really road engines. When these engines were used in switching service, they were generally equipped as a switch engine, with safety appliance standards.

(Testimony of Frank F. Engles)

Referring to the red line in Plaintiff's Exhibit No. 1, which I spoke of as main line tracks, these tracks proceed to the south through Tunnel No. 1, shown on this map, and then on through Tunnel No. 2, and so on, to a location on the railroad line known as the Bay Shore. I don't know it to be the general practice of the Southern Pacific to make up and break up trains at Bay Shore, which is about four miles to the south of Tunnel No. 1.

Q. Do you recall seeing any freight trains fully made up and drawn by a road engine entering the area or district marked on Plaintiff's 1 with the letter "B"?

A. Yes, I have.

Q. On what occasion?

A. On these particular occasions that I have testified to here.

Q. Then you call those freight trains?

A. They are freight trains in the sense of the law, I believe. [41]

Q. That will be a matter for argument here, I think. When I speak of a freight train in this series of questions, I mean a train that is coming into San Francisco with loaded or empty cars, and with a road engine and a caboose, and all the usual equipment of a road freight train.

A. I don't believe I could qualify on that, because I am not there at all times.

I have no record of how many of these ten cars in the first transfer were loaded or empty. As to

(Testimony of Frank F. Engles)

all the movements, I believe there were mixed loads; I don't know as to how many loads or empties there were.

As to the movements going toward Mission Bay, as I recall it, the cars extended back on Sixth Street toward Third; they were made up in that location; the engine was coupled on the west end, with the exception of the two movements that were shoved ahead of the engine. As to the movements from the Mission Bay district, I did not notice whether in any of those cases the switch engine, which was ahead of the cars, was entirely out of the area marked "A" and on the green line, while some of the cars were back on the area marked "A". I believe we observed the engines as they came out of the Mission Bay Yard at about the viaduct at Sixteenth Street on those movements. I believe the viaduct at the south end of area "A" is approximately correctly shown by a cross on Plaintiff's Exhibit No. 1. As far as I know this viaduct, on each of the occasions to which I have testified, was available for the use of trucks and other vehicles which desired to pass over the railroad tracks without being subjected to the hazard of a collision with any train.

None of these movements had cabooses on them. "Markers", as railroads use that expression, consist of lanterns by night and flags by day to indicate the rear of the train.

(Testimony of Frank F. Engles)

Mr. BOOTH. Did any of these transfers carry markers, either lanterns or flags?

Mr. KILKENNY. We object to that, your Honor, as immaterial, irrelevant, and incompetent.

The COURT. The objection is overruled.

Mr. KILKENNY. We note an exception.

The COURT. The legal effect of it, if any, can be discussed in argument.

(Witness continuing):

None of them carried markers. In my official capacity as inspector, I have credentials which I can display to railroad officials and employees; these are issued by the Bureau of Safety of the Interstate Commerce Commission. I presume if we [42] desired to that we would have no difficulty in ascertaining whether a given train or a given transfer of cars was moving on a time table. I made no inquiry to ascertain that fact, so I can not say whether they were time table movements. I do not know whether any of the movements were made on train dispatcher's orders. Without referring to certain records, I believe the 10th was the first day, as near as I can remember, that I was in and about the premises to which I have testified; the movements occurred on the 10th, 11th, 12th and 13th of November, 1930. I rode each of the trains. Mr. Hamilton was with me. At times we inspectors travel in pairs. Neither of us, to my knowledge, requested any Southern Pacific official, or subordinate official or employee to accompany us

(Testimony of Austin D. Hamilton)

on these movements. I could not say whether or not any of the cars that moved into the area marked "A" to which I have testified, were transferred to industries, or to other railroads, or to water carriers. As to cars I have testified that moved into the area marked "B" on Plaintiff's Exhibit No. 1, I saw some placed at the freight house in that area, but cannot testify as to the particular cars. This freight house is the sheds on Berry Street, shown on Plaintiff's Exhibit No. 1, lying just northwest of the channel; they run parallel with the channel in the area marked "B". I could not say whether the cars I saw placed or spotted at these sheds were loaded or unloaded.

REDIRECT EXAMINATION.

As to the air brake equipment on a switch engine and a road engine, there may be some difference on some engines, and it may be alike on others.

AUSTIN D. HAMILTON was thereupon called as a witness for plaintiff, who, being first duly sworn, testified as follows:

I am an Inspector for the Bureau of Safety, Interstate Commerce Commission; have been so engaged since September 30, 1914. I was so engaged on the 10th, 11th, 12th and 13th of November, 1930. I have had about twenty-five years in train service

(Testimony of Louis P. Hopkins)
as brakeman, conductor, and yardman. I was with Mr. Engles when he made the inspections he testified to. I heard all his testimony about the movement of cars on the Southern Pacific tracks over the line shown in green on Plaintiff's Exhibit No. 1, between the areas marked "A" and "B". I was there on all those occasions; I also rode the movements that he testified, and with him.

(It was thereupon stipulated by counsel that the witnesses direct and cross-examination would be the same as Mr. Engles.) [43]

Mr. KILKENNY. That is the Government's case, your Honor.

LOUIS P. HOPKINS, was thereupon called as witness for the defendant, who, being first duly sworn, testified as follows:

I am employed by the Southern Pacific Company as trainmaster; have been so employed for thirteen years at Carlin, Nevada, Watsonville, California, and San Francisco, California; have been continuously employed in San Francisco for three years. From November 10th to 13th, inclusive, 1930, I was employed at and familiar with the San Francisco yards as trainmaster. I am also familiar with the track layouts and operations of the portion of that yard shown on Plaintiff's Exhibit No. 1. The red line represents the main track operating between San Francisco and the direction of Los

(Testimony of Louis P. Hopkins)

Angeles, a double track of railroad. Plaintiff's Exhibit No. 1 does not show all of the San Francisco yard. That yard extends south from Tunnel No. 1 to San Bruno, including the San Bruno station, and what is known as the old main track via Valencia Street, which includes sidings, at Burnell, Ocean View, Colma, and other spur tracks in that territory, including an area or district known as Bay Shore; that was also the case November 10 to 13, 1930. With the exception of the banana train on Friday night, the usual and ordinary practice of the Southern Pacific Company is to make up and break up freight trains carrying freight southbound from San Francisco, or northbound into San Francisco, at Bay Shore. The banana train is made up in the Mission Bay unit and leaves from that unit. This was also the practice in November, 1930, and prior thereto. There is one general yardmaster, Mr. J. G. Selden, who had at that time, and still has, jurisdiction over the San Francisco yard. He has yardmasters and assistant yardmasters in the various units of yards.

The distance from Tunnel No. 1 to Bay Shore, where these trains are made up and broken up is 4.1 miles. Neither before November, 1930, nor then, nor since then, have road freight trains come into San Francisco as road freight trains. As to how the freight trains which go to make up these road freight trains are taken out of San Francisco toward Bay Shore, and taken from Bay Shore into San

(Testimony of Louis P. Hopkins)

Francisco: they are moved in by what is termed a yard drag, a drag service between the two units of the yard; that extends to Mission Bay, Sixth Street, the Belt Line Transfer, the Sixteenth Street industrial territory, and other industrial territory around the [44] San Francisco terminal. Referring to Plaintiff's Exhibit No. 1, the Belt Line transfer starts at Second Street and runs toward the Ferry Building. It is shown down here opposite Block 264 and down through that way. It is directly to the south, you might say, of Block 264. The tracks are parallel; the short tracks are spurs. Block 264 is just west of Pier No. 30; it runs from there in a westerly direction up to the point that would be approximately opposite Pier 40.

These drags, as they come into the portion of the San Francisco yard north of Tunnel No. 1, and as they go out through Tunnel No. 1, are coupled with air; they use the main track entirely from San Francisco Tunnel No. 1 to Bay Shore. These drags enter and leave the main track at the area shown as "A", approximately just west of where Barstow Street is shown; you will notice there is a connection there that goes right through and goes into the main track, indicated by a black line; that is the connection from what we call the switching drill into the main track; they enter and leave the main track through that point.

We were not able to identify the drags that these gentlemen referred to in the complaint, for the rea-

(Testimony of Louis P. Hopkins)

son that no time was shown, but these engines that they enumerate there are operated in that territory, handling similar service, as they have called attention to. We have drags coming from the Bay Shore that go into "A"; we also have drags that go into "B". I might say that there are three drill tracks paralleling this main track. The track that the so-called Bay Shore drag uses is not the same as this switching drag was operated on that the complaint refers to. What I mean by a drill track, is a track that is used for switching purposes, drilling back and forth, and from which spur tracks and industries are taken off; that is to be distinguished from the main line track; that is an inside track that is independent of the main line track entirely, and on which no movements of main line travel are made. The track shown in green in Exhibit No. 1 is the connection between the area marked "A" and the area marked "B"; that was also true in November, 1930, and also before and since then; it was not used as a main line track in whole or in part; it is entirely separate and distinct from the main line track. The green track is what I refer to as the drill track. The lines shown on Exhibit No. 1 that connect with the green track and northeast of it, through blocks 130, 132, 134, etc., are industry tracks; they are strictly industrial tracks, spurs, for the purpose of serving industries with cars and taking cars away after they are loaded; they are in no sense main line tracks. Except for the banana

(Testimony of Louis P. Hopkins)
train, none are made up in the area shown on this map. [45]

I am familiar with the engines testified to by the witness Engles; they are what we call the S. W. switch type; they are engines without a pony truck; they are entirely equipped for switching purposes; they are not used for any other purpose. The handling of drags or cars over the line marked green in Plaintiff's Exhibit No. 1 are not schedule time table movements; they are not made under the direction of a train dispatcher; these movements are made under directions originating with the general yardmaster, being directly handled by yardmasters, under his direction; the yardmaster in this case would be what we call a desk yardmaster who sits at Fourth and King Streets—Fourth and Berry.

Transfers or drags of cars during the period testified to by the two inspectors are not handled by road crews, that is, engineers, brakemen, firemen, and conductors that regularly run on road freight trains; they are yard crews. In the case of engine 1198, the engineer in that case is restricted to yard service; we have quite a few of the same cases in the terminal.

As to the use of the west end of this green line for switching purposes, that is, the end nearest Sixth Street, that is a territory that serves the freight sheds; in addition to that, it serves industries that reach down as far as Third and Berry

(Testimony of Louis P. Hopkins)

Streets, Third and Channel, which can be identified as the Southern Pacific Terminal Building. In the territory between that and Sixth Street, there are several spurs serving lumber yards, rock bunkers, and sundry industries in the territory. This green line is used by engines in switching for the sheds, and in making what we would call a double freight movement, doubling from one track to another. On drags of thirty cars, the engine would be approximately half of the distance on the straight green line between "B" and "A". That would be about between Irwin and Hubbell. In the reverse direction, an engine switching or doubling a long drag in the part marked as "A", if it were possible for the two of them to be working on that lead at the same time, the engines would almost come together on the green line; it is a single track lead there. There are three tracks in there; the No. 2 lead is next to the main track; the No. 3 lead is the lead that is used to Mission Bay; No. 4 is a drill lead off which these spurs lead that you asked me about a few minutes ago; that is only used as an emergency lead; this is a single track lead in the movements that are referred to. In November, 1930, prior thereto and since, the green line tracks have customarily been used in these switching operations that I have been describing; for a period of years there has been no change in the movements there.

When I speak of doubling over, I mean by that, taking a drag of twenty cars, that ten cars might [46]

(Testimony of Louis P. Hopkins)
be on one track and ten on another in the area marked "B"; in other words, the engine has to pull maybe ten cars off one track and pull them out a sufficient distance to get over the switch and throw the switch, and then back up on the others to complete the drag. The approximate length of a drag of ten cars would be 440 feet for the ten cars, and about 70 feet for the engine, which would make about 510 feet.

I heard Mr. Engles' testimony about how these transfers could be handled with braking power, if there were no air brakes coupled up. I do not agree with that testimony. The crew are required by rule to be distributed over the tops of these cars to manually control them by hand brake, if necessary. Ordinarily, the brakes on the engine could handle a drag such as has been described here, running from eight to twenty-six cars, at the speed at which they were operated. The best proof that they could be handled is that they have been handled that way, to my knowledge, for twenty-five years, without accident.

As to the form of crossing watchman protection at the main streets, beginning at Sixth Street: At Sixth Street, ordinarily, the engine, in starting from that territory would be south of Sixth Street proper; after leaving Sixth Street the first crossing that is made from between the freight sheds is Berry Street; at this point there is a crossing watch-

(Testimony of Louis P. Hopkins)

man between seven A. M. and six P. M. The next open street is Hooper Street; there is no protection at that crossing. The travel on Hooper Street is negligible; the same applies to Irwin, Hubbell and Daggett; the company maintains crossing watchmen at Irwin and Hubbell Streets, but not at Daggett. Barstow comes into Sixteenth Street and is not across the tracks. There is a flagman for twenty-four-hour periods at Sixteenth Street. Continuing around, you again cross Sixteenth Street at the mouth of Mission Bay, where there is a twenty-four-hour watchman service.

As to the character of the travel on Irwin, Hubbell, and Daggett Streets, as shown on Plaintiff's Exhibit No. 1; In the morning, probably from seven to nine, there will be a few truck movements reaching industries that are in the territory served by the spur tracks shown on this map. Again, there will be infrequent movement over these tracks throughout the day.

The viaduct over Sixteenth Street is shown with approximate correctness on Plaintiff's Exhibit No. 1. That viaduct was built through a franchise arrangement; am not sure of the year, but I think it was around 1914. It was [47] made to direct the traffic away from the grade crossing on Sixteenth Street, which is continuously blocked by our engines in switching Mission Bay; we block Sixteenth Street as much as thirty minutes to an hour at a

(Testimony of Louis P. Hopkins)
time. That is the street with the greatest volume of traffic in that neighborhood. Berry Street in the early morning is a heavy traveled street and is busy. There is nothing to prevent the driver of trucks or other vehicles from using this viaduct when the crossing is blocked, or if they fear they might collide with or be collided by some locomotive or string of cars. The reason they do not use it is that the grade is pretty stiff on the approach; also trucks use it, also pleasure automobiles. The ones that do not want to use it just have to wait until the crossing is unblocked.

The area of tracks used by the railroad and marked "A", is for assembling cars from industrial sections, transfers, and from boats arriving in Mission Bay slip into drags, where they are taken to Bay Shore and segregated for train movement. There are three different units in that system of tracks in the area marked "A". There is what we call the Elliott yard, there is the hay yard, and there is the Mission Bay unit. These units are all in the Mission Bay area. There are also industrial tracks in the district down in the vicinity of the channel. In addition to that, there is a system of team tracks in what is known as the hay yard. That is all reached from this point here—that is an extension of the green line. These tracks are also used for preparing cars for special commodities, such as for sugar. They are also used for cars to be transferred

(Testimony of Louis P. Hopkins)

to the Atchison, Topeka & Santa Fe Railroad; the segregation is made at that point. The extension of the Santa Fe tracks, where their switching is done, is shown on the map, just west of Piers 48 and 50; it goes on down. Their particular yard is in China Basin. All cars received from the Santa Fe, and also from the Western Pacific, and also from Southern Pacific boats, through the point shown as S. P. Ferry Slip, are segregated into drags in this Mission Bay area, and hauled in solid drags to the Belt Line transfer. That includes cars that arrive through those agencies that are delivered all the way from Townsend Street to Fort Mason. Fort Mason is not shown on this map; it is north of the portion shown as Union Ferry Station.

Passenger trains coming in and going out of San Francisco from the Third and Townsend Street station use the red line main track entirely. The passenger yard extends from Seventh Street to Third, and are an entirely separate set of tracks from those cited in the complaint; we do not use that for freight purposes. The only [48] freight movement that is made over there is that a drag that is coming in from either Mission Bay unit or the Bay Shore unit going to Sixteenth Street territory pulls down through the interlocking plant and backs out Townsend Street.

The traffic at night is practically nothing. It is very, very infrequent on all of them, including Six-

(Testimony of Louis P. Hopkins)

teenth Street; that is, Sixteenth Street after nine o'clock at night, and on Berry Street after six o'clock at night.

As to the physical condition of these grade street crossings and the ability of drivers and pedestrians to see an approaching train on the green line, they are wide open crossings; there is no obstruction of the view.

The railroad term "classification" as applied to freight cars, is that portion of the yard that is used for segregating cars to units, for different train movements, for delivery to other carriers, and with boat connections, and rail connections. I would say that it would be very proper to call the area marked "A" a classification unit or area.

Now, as to the area marked "B", that is used for other purposes. The territory in "B" is more of a freight shed territory, and other industries, of course, that are reached in that territory, as well as the tracks that are known as 47 and 48, which are used as an assembly track; in other words, cars in this territory, as they are taken out, are thrown over there, and as they assemble into a suitable drag they are taken to Mission Bay for movement and connections, or to Bay Shore for train movement. Taking a typical case for illustration: Suppose a drag of twenty cars comes from Bay Shore and goes through Tunnel No. 2 and Tunnel No. 1, and leaves the main line track just south of Barstow Street; it does not touch the green line track coming from

(Testimony of Louis P. Hopkins)

Bay Shore; then supposing, in that drag of twenty cars, we have some of them that are to be taken across San Francisco Bay by the car ferry, and some of them that are going to the Santa Fe, and some of them that are going to these sheds E. F., and G, shown in the area marked "B", that drag of twenty cars would be segregated in the area marked "A" and the cars that went to the Santa Fe would be transferred to it, and those that were to go up to the area marked "B" would be taken to it over the green line. Now, taking a typical drag of cars moving from "B" to "A" over the green line; they might consist of several different classes of cars, some to go across the bay on the car ferry, some to be transferred to the Santa Fe, and some to the Western Pacific, and some to the Belt Line. The reason for taking them there, is that that is the segregating point for San Francisco cars; it [49] would not be possible to do the segregating at the area marked "B".

This green line does not cross any street car tracks, nor any main line railroad tracks of this or any other railroad.

As to the necessity or convenience to go upon any main line track in going from "A" to "B", or from "B" to "A", there is no point that you can go from this drill track to the main track, except through the connection which is in the vicinity of Sixteenth Street; it is shown in a black line, just about east of Block 32. There is no connection between King

(Testimony of Louis P. Hopkins)

Street and Sixteenth Street, between this drill or any of the drills and the main tracks. By "this drill," I refer to the green line as shown on Plaintiff's Exhibit No. 1, for the reason that there is another drill track between this green line, that is shown in the black line on this Exhibit and the red line which is the track that is used by Bay Shore drags going direct from Sixth Street to Bay Shore.

Mr. BOOTH. I am not sure whether you testified to this, but I will ask you again whether the drags that moved to or from either "A" or "B", from or to Bay Shore, are handled with the air coupled up?

Mr. KILKENNY. That is objected to as immaterial, irrelevant, and incompetent.

The COURT. The objection is overruled.

Mr. KILKENNY. Exception.

(Witness continuing)

The air is coupled on all drags between all units of the San Francisco yard and Bay Shore; they use the main line from a point near Sixteenth Street to Bay Shore; there is a filled-in trestle across the channel.

When Mr. Engles was counting the grade crossings, he referred to the grade crossing at Sixth Street; that is a grade crossing in the area marked "B". Fifth Street is a closed street.

Mr. BOOTH. Would the coupling up of air between the switching engines and the drags of cars on this green line result in a substantial additional

(Testimony of Louis P. Hopkins)
annual operating cost, as well as delay in operations? [50]

Mr. KILKENNY. That is objected to as immaterial, irrelevant, and incompetent. It has no bearing on the issues in this case.

The COURT. I am inclined to think the objection is good. I will permit the question to be answered, however. It may be discussed later.

Mr. KILKENNY. Exception.

Mr. BOOTH. I will say frankly that it has been held by the Circuit Courts of Appeal that the question of cost in safety matters is not a defense. I am asking the question more for the purpose of showing that we are not doing what we have been doing arbitrarily, and without any sound operating reason. It might be said to be a question of avoidance, looking at it in one way.

Mr. KILKENNY. I think counsel has confessed that the objection is good.

Mr. BOOTH. I think the admission would be harmless.

The COURT. That was my impression. It would not be a defense. We might as well not take the time to go into it. I will sustain the objection.

Mr. BOOTH. We note an exception. Will you state from your experience as an operating man, and your observation of the operation here complained of, whether the handling of drags of cars, as you have described them, on the green line without coupling air, and as described by the two wit-

(Testimony of Louis P. Hopkins)

nesses for the plaintiff, is a safe or unsafe operation?

Mr. KILKENNY. We object to that as immaterial, irrelevant and incompetent, and no bearing on the issues here. Any safety contrivance that they may have that is not specified in the law would have no bearing on the case.

The COURT. At this time the objection will be overruled.

Mr. KILKENNY. Exception. [51]

(Witness continuing)

I would consider moving at the slow speed that we have to move in this territory between the two units, that the measure of safety would be greater without air through the cars than it would be with air. This is for the reason that an emergency stop made at slow speed is more hazardous than a stop that is made by operation of the engine brakes alone, the reason being that the serial operation of brakes through a line of cars starts from the head car, and an emergency application does not give air a chance to equalize. The result is you are making a mountain on the head end, and the other cars come in against it and there are serious results throughout the cars, as well as on the rear end.

Mr. BOOTH. There are no cabooses on these drags of cars, are there, in which the crew rides?

WITNESS. No.

Mr. BOOTH. Where does the crew ride?

WITNESS. On top.

(Testimony of Louis P. Hopkins)

Mr. KILKENNY. If your Honor please, I want to move to strike out all of the answer of the witness to the previous question with regard to the comparative safety of different appliances upon the ground that it is immaterial, irrelevant, and incompetent. It has been held time and again by the Courts—by the Supreme Court—that any safety precautions that may be taken which are not prescribed by the law would not be a defense. It is entirely up to Congress to prescribe what shall be used.

The COURT. We will not take the time to argue that now. We will take that up later.

(Thereupon, an adjournment was taken until Friday, July 31, 1931, at 9:30 A. M.)

(Witness continuing on July 31, 1931, 9:30 A. M.)

The length of the San Francisco yard from the Southern Pacific passenger station shown on Plaintiff's Exhibit No. 1 is 11.2 miles; this includes certain portions of the track lay-out at San Bruno. [52]

I want to make a correction in my testimony yesterday. My attention was called to the fact that I stated there was a crossing flagman at Hubbell and not at Hooper. It should have been reversed; it should be at Hooper and not at Hubbell.

Referring to the move of drags of cars to and from Bay Shore when air was used: We have in that service two types of engines, one known as a consolidation type or a road engine that has been converted to a switch engine by removing the pilots

(Testimony of Louis P. Hopkins)

and applying foot boards; in that type of locomotive the speed on the main track is thirty-five miles an hour. On the switch type it is twenty miles an hour. Twenty miles an hour on the main track is the company's limitations on the speed of these switch engines. Where the engine is pulling a move on the green line shown on Plaintiff's Exhibit No. 1 over this drill track, the speed will average between six and eight miles an hour; when the engine is shoving the cars ahead of it the speed will average between four and five miles an hour. The drags that are moved on the main line to and from Bay Shore will average two or three times as many cars as drags on the drill track.

CROSS-EXAMINATION.

Referring to Plaintiff's Exhibit No. 1, the track that is shown in green color is the one I have designated as a drill track. It is a fact that all of the movements of cars from the area that is marked "A" to and from the area marked "B" are made over the green track, but that track is also used as a switching lead to both "A" and "B". As to what I mean by a "switching lead": A drag that is being switched in the portion shown as "A", or Mission Bay, with a number of cars, will be half way down this track between "A" and "B" in a switching movement or moving from one track in "A" to another track in "A", in making a move. What I mean by that is this: We will pull, say thirty cars

(Testimony of Louis P. Hopkins)

out of "A" from probably different tracks, or probably make a straight move from one track in "A" to another track in "A". In making that move, the engine will be half way down the same track in a straight line between "A" and "B" in order to make the move. In making a similar move in "B" the same condition would exist; that is, a car movement may be made out of "A" onto that track shown in green, the locomotive proceeding about half way, and then these cars may be backed into the area "A" again onto another track; and a like movement may be made in the area "B". There is a parallel track to the green track that has spur tracks connecting, but not with the green track.

The speed of the movement of the cars shown [53] in green is designated by a rule of caution; the engineer must move according to conditions. The condition of switching movements on both ends of that green track make slow speed necessary. The speed is governed by the rule of caution in our book of rules, which requires that movements will be made with caution. Caution is described as moving at reduced speed according to conditions, prepared to stop short of a train, engine, and cars, or misplaced switch, or before reaching a stop signal, and where conditions require, the train must be preceded by a flagman.

REDIRECT EXAMINATION.

The rule under the heading "With Caution", on page 8 of the Southern Pacific Rules and Regula-

(Testimony of Louis P. Hopkins)

tions of the Transportation Department, reads as follows:

> "To run at reduced speed according to conditions, prepared to stop short of a train, engine, car, misplaced switch, derailing rail or other obstruction, or before reaching a stop signal; where circumstances require, train must be preceded by a flagman."

Cars are moved in drags, or transfers, or whatever they may be called, from the area marked "B" to the area marked "A", for the purpose of segregation into drags at Mission Bay area for delivery to connecting lines, and for movement from Mission Bay to Bay Shore for train movement, as well as for delivery to industries in the Mission Bay area, or vice versa.

Cars moving in the reverse direction, that is from "A" to "B", are cars that are brought in in drags from Bay Shore and Mission Bay, segregated for delivery to industries or sheds; also cars received from connecting lines through the transfer, as well as by the boat from Oakland and Sausalito.

Q. Are these cars that are to be delivered to the sheds shown in the area marked "B" arranged in order at Mission Bay, so that they can be spotted at the sheds without undue delay or operating cost?

A. Practically all the merchandise for loading at the freight sheds originate at Mission Bay area. In addition to that, merchandise arrives via boat at

(Testimony of Louis P. Hopkins)

Mission Bay slip and is taken from there to be spotted at the freight sheds.

Q. I want to read to you a definition of the word "train" as given by the United States Supreme Court through Mr. Justice Brandeis, [54] in the case of United States v. Northern Pacific Railway Company, 254 U. S., the opinion beginning at page 251, the portion from which I am reading being at the bottom of page 254:

> "A moving locomotive with cars attached is without the provision of the Act only when it is not a train, as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains."

Can you say from your railroad experience, as well as from your personal knowledge of the situation here considered, whether the movements over the green line on Plaintiff's Exhibit No. 1, and testified to by the two interstate inspectors, are movements which come within that definition, movements as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains?

Mr. KILKENNY. We object to the question as immaterial, irrelevant, and incompetent, and calling for the conclusion of the witness, and also for an answer that involves a conclusion of law, and not a question of fact. The Courts have passed on what

(Testimony of Louis P. Hopkins)
movements are switching movements, and what movements are train movements, as matter of law, under particular circumstances.

Mr. BOOTH. I suppose it may be fairly said from the decisions—and, of course, that is a matter of argument—whether a certain movement is a train movement or not. It is perhaps a mixed question of fact and law. It is more a question of fact than of law. Your Honor will find from the authorities that we will hereafter cite to you that the Courts have gone to great length to describe the physical conditions that exist surrounding a particular movement. In so far as this is a question of fact, we think it is competent for the witness to testify from his experience, and from his observations, whether the movements here made the subject of courts in the complaint fairly fall within the definition of the exception. As a question of law, of course, that is a matter [55] for the courts to decide.

Mr. KILKENNY. This is calling for an answer to the very question that is at issue in this case. The decision in this case depends upon whether or not this was a switching movement or a train movement. As I say, it is clearly a question of law as to which kind of a movement this is. It would at least be a conclusion of law.

The COURT. My present impression is that where the facts are shown there is nothing left but

(Testimony of John G. Selden)

a conclusion of law. The objection will be sustained.

Mr. BOOTH. We note an exception. That is all.

JOHN G. SELDEN was thereupon called as a witness for defendant, who, being first duly sworn, testified as follows:

I am general yardmaster for the Southern Pacific Company at San Francisco Terminal. I have heard Mr. Hopkins' testimony as to the extent of that yard; it is correct.

As general yardmaster, I have three assistant general yardmasters, located at Fourth Street; three assistant yardmasters at Mission Bay; an assistant yardmaster and a yardmaster at Sixth Street; three yardmasters and three assistant yardmasters at Bay Shore. Their hours vary from eight A. M. to four P. M., and from four P. M. to midnight, and from midnight to eight A. M.

I heard the testimony of Mr. Engles, Mr. Hamilton and Mr. Hopkins. I agree with Mr. Hopkins that the line shown in green on Plaintiff's Exhibit No. 1 is a drill track from Mission Bay to Sixth Street. The district yardmaster directs the movement of cars over that line; he is located at Fourth Street, between Berry and King Streets; Block 150. He communicates by telephone. These trains of cars do not move over the green line under dispatcher's orders; nor under time tables. Switching crews man

(Testimony of John G. Selden)
the engines and drags; these drags are not regularly scheduled in any way.

Q. I want to ask you the same question I asked Mr. Hopkins, to which plaintiff's objection was sustained. I read from 254 U. S., at the bottom of page 254, a definition phrased by Mr. Justice Brandeis in the case there reported, [56] as follows:

> "A moving locomotive with cars attached is without the provision of the Act only when it is not a train, as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains."

And I ask you whether these moves on this green track shown on Plaintiff's Exhibit No. 1 are or were anything more than moves for the purpose of switching, classifying, and assembling cars or like moves for the purpose of making up trains or breaking up trains, or delivering cars for loading or unloading?

Mr. KILKENNY. We make the same objection we did to a similar question put to the former witness, on the ground that it is immaterial, irrelevant, and incompetent, and calling for the conclusion of the witness, and asking for an answer to the very question at issue in this case. It is a conclusion of law.

The COURT. The objection is sustained.

Mr. BOOTH. We note an exception. Perhaps I

(Testimony of John G. Selden)

can shorten this direct examination, with the consent of counsel.

Q. Did you hear Mr. Hopkins' testimony as to the reason for moving cars over the green line from and to Mission Bay?

A. Yes, sir.

Q. Do you agree with the answers he gave to my questions on that subject?

A. I do.

Mr. BOOTH. That is all.

Mr. KILKENNY. No questions.

Mr. BOOTH. The defendant rests.

Mr. KILKENNY. If your Honor please, at this time the plaintiff moves for a judgment in favor of the plaintiff and against the defendant on all the issues in this case, and [57] also moves the Court to make special findings of fact in this case in favor of the plaintiff, as follows:

This cause having been tried before the Court, the plaintiff requests the Court to make the following findings of fact:

1. On November 10, 11, 12 and 13, 1930, defendant operated over its line of railroad in the City of San Francisco, five "drags" or transfer movements of cars between its Mission Bay yard and its Sixth Street yard, a distance of approximately one mile, when the air brakes on each of those "drags" or

transfers was in use on the locomotives and tender only.

2. Each of the cars and locomotives used in the various movements were equipped with air brakes and in addition each locomotive was equipped with appliances for operating the air brakes on the various cars. In each instance the air hose between the tender and adjoining car was not coupled, thus making it impossible for the engineman on the locomotive drawing the "drag" or transfer to operate the air brakes on the various cars.

3. The number of cars in those "drags" or transfers varied from eight to twenty-six cars, exclusive of locomotive and tender. The movements were over tracks set apart for transfer movements of cars between the two yards and were not used by regular scheduled or main line trains. During the movements between the two yards some six or eight public streets were crossed at grade, crossing watchmen being stationed at the various crossings, and the movements were at a speed of about five miles an hour.

4. In each of the five transfer movements on the dates in question, the cars were moved as a unit from one yard to the other without any cars being set out or picked up en route, [58] and upon arrival at either of the two yards the individual cars were placed upon various tracks.

The following are the conclusions of law which we request the Court to make in favor of the plaintiff:

1. The movements of cars as set forth in the findings of fact were train movements within the meaning of the airbrake provisions of the Safety Appliance Acts, as modified by an Order of the Interstate Commerce Commission of June 6, 1910, which requires that at least 85% of the cars in any train shall be equipped with air brakes and under the control of the engineman on the locomotive drawing such train.

2. On November 10, 11, 12 and 13, 1930, defendant violated the Safety Appliance Acts in moving the five trains between its Mission Bay yard and its Sixth Street yard in the City of San Francisco, when none of the air brakes on the cars in such trains was under the control of the engineman on the locomotives drawing such trains.

I ask leave to file this.

Mr. BOOTH. If the Court please, the defendant resists and opposes the motion and asks that in lieu thereof the Court find and conclude that none of the movements of transfers referred to in the complaint or described in the testimony was a train movement, and that, therefore, there was not by any of said movements any violation of the Act of Congress known as the Safety Appliance Act, or the order of the Interstate Commerce Commission pleaded and described in each of the causes of action.

I believe the understanding is that we will file briefs, is it?

The COURT. I would like to have points and authorities cited.

Mr. KILKENNY. How will we proceed to do that? I [59] suppose we will open? Your Honor requires written briefs, do you?

The COURT. Well, I think I would like to have points and authorities. I don't know about a brief. I suppose you might call that a brief.

Mr. BOOTH. It was our thought yesterday afternoon that perhaps your Honor would like to have the benefit of reading the testimony.

The COURT. Yes, I would.

Mr. BOOTH. And also the map, and also have your attention called to the decisions of the Supreme Court and other Federal Courts, such cases as the parties desire to cite.

The COURT. Yes, I would.

Mr. KILKENNY. Will it be satisfactory that each side have fifteen days for submitting such points and authorities, the plaintiff to open?

The COURT. Fifteen to open, and fifteen to the other side to reply. Do you want any time for closing?

Mr. KILKENNY. We will not require any time for closing.

The COURT. And I understand the Court will have the benefit of a transcript of the testimony?

Mr. KILKENNY. Yes, the Court will be furnished with a transcript of the testimony.

Mr. BOOTH. Yes, your Honor.

The COURT. It will be understood that the case will stand submitted upon the filing of the briefs.

The foregoing, consisting of twenty-five typewritten pages, having been examined by me and found to be a true and correct transcript of proceedings had in this cause, may be and the same is hereby allowed and settled as the plaintiff's Bill of Exceptions herein. [60]

Dated this 26th day of December, 1931.

FRANK H. NORCROSS,
United States District Judge.

The foregoing proposed Bill of Exceptions may be allowed and settled without further notice.

A. G. GOODRICH,
HENLEY C. BOOTH,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 29, 1931. [61]

(Title of Court and Cause.)

PETITION FOR APPEAL.

Comes now the plaintiff, the United States of America, by its attorneys, and feeling itself aggrieved by the rulings of the court and final judgment entered in this cause of action hereby prays

that an appeal be allowed by the United States District Court for the Northern District of California, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this petition plaintiff herewith presents its Assignment of Errors.

Dated this 24th day of December, 1931.

GEO. J. HATFIELD,
United States Attorney,
LUCAS E. KILKENNY,
Assistant United States Attorney.

[Endorsed]: Filed Dec. 24, 1931. [62]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now the plaintiff, the United States of America, by its attorneys, and in connection with its Petition for Appeal, says, that in the record, proceedings and final judgment in the above entitled cause manifest error has intervened to the prejudice of the plaintiff, upon which it will rely in the prosecution of its appeal herein, to wit:

I.

The Court erred in overruling plaintiff's objections to the following question asked of the witness Hopkins by counsel for defendant and in permitting said witness to reply thereto, to which action of the Court plaintiff then and there duly excepted:

Q. Will you state from your experience as an operating man, and your observation of the operation here complained of, whether the handling of drags of cars, as you have described them, on the green line without coupling air, and as described by the two witnesses for the plaintiff, is a safe or unsafe operation?

A. I would consider moving at the slow speed that we have to move in this territory between the two units, that the measure of safety would be greater without air through the cars than it would be with air. [63]

II.

The Court erred in refusing to enter judgment for plaintiff on the first cause of action, as requested by plaintiff, at the close of the testimony.

III.

The Court erred in refusing to enter judgment for plaintiff on the second cause of action, as requested by plaintiff, at the close of the testimony.

IV.

The Court erred in refusing to enter judgment for plaintiff on the third cause of action, as requested by plaintiff, at the close of the testimony.

V.

The Court erred in refusing to enter judgment for plaintiff on the fourth cause of action, as requested by plaintiff, at the close of the testimony.

VI.

The Court erred in refusing to enter judgment for plaintiff on the fifth cause of action, as requested by plaintiff, at the close of the testimony.

VII.

The Court erred in entering judgment in favor of defendant on the first cause of action.

VIII.

The Court erred in entering judgment in favor of defendant on the second cause of action.

IX.

The Court erred in entering judgment in favor of defendant on the third cause of action.

X.

The Court erred in entering judgment in favor of defendant on the fourth cause of action. [64]

XI.

The Court erred in entering judgment in favor of defendant on the fifth cause of action.

WHEREFORE, for such errors, the plaintiff, the United States of America, prays that said judgment of the United States District Court for the Northern District of California, Southern Di-

vision, dated November 27, 1931, be reversed as to each of said five causes of action and the same remanded for a new trial.

GEO. J. HATFIELD,
United States Attorney,
LUCAS E. KILKENNY,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 24, 1931. [65]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

The plaintiff in the above entitled cause having prayed for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the proceedings and judgment made and entered herein by the United States District Court for the Northern District of California, Southern Division, on the 27th day of November, 1931, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors and prayer for reversal pursuant to the statute and rules in such case made and provided;

IT IS NOW HEREBY ORDERED that an appeal be and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Cir-

cuit from the District Court of the United States for the Northern District of California, Southern Division, as provided by law, and

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and certify a Transcript of Record, proceedings and judgment in this cause and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit so that he shall have the same in the said Court within sixty days from this date.

Dated this 26th day of December, 1931.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed Dec. 29, 1931. [66]

(Title of Court and Cause.)

STIPULATION

for Transmission of Original Exhibit to the United States Circuit Court of Appeals and Order Approving Same.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the Clerk of this Court shall transmit plaintiff's Exhibit No. 1 filed herein to the United States Circuit Court of Appeals for the Ninth Circuit to be considered by

it in connection with plaintiff's appeal herein.

Dated this 24th day of December, 1931.

GEO. J. HATFIELD,
United States Attorney,
LUCAS E. KILKENNY,
Assistant U. S. Attorney,
Attorneys for Plaintiff.
A. G. GOODRICH,
HENLEY C. BOOTH,
Attorneys for Defendant.

IT IS ORDERED that the Clerk of the Court shall transmit the exhibit described in this stipulation to the United States Circuit Court of Appeals for the Ninth [67] Circuit to be considered by it in connection with plaintiff's appeal herein.

Dated this 26th day of December, 1931.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed Dec. 29, 1931. [68]

(Title of Court and Cause.)

STIPULATION FOR DIMINUTION OF RECORD.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that in the printing of the Transcript of Record herein, the title of the Court and the title of the cause and captions on the pleadings and documents need not be

printed in full, but may be entitled thus ("Title of Court and Cause"), and that the endorsement on such papers and documents, except the filing endorsements may also be omitted.

Dated this 24th day of December, 1931.

GEO. J. HATFIELD,
United States Attorney,
LUCAS E. KILKENNY,
Assistant U. S. Attorney,
Attorneys for Plaintiff,
A. G. GOODRICH,
HENLEY C. BOOTH,
Attorneys for Defendant.

It is so ordered:

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed Dec. 29, 1931. [69]

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of Said Court:

Sir:

Please prepare and certify copies of such papers filed and proceedings had in the above entitled action as are necessary to a determination of plaintiff's appeal herein, and more particularly as follows:

1. Summons and Marshal's return.
2. Complaint.

3. Answer.
4. Stipulation waiving trial by jury.
5. Opinion and order for judgment.
6. Stipulation dated and filed December 29, 1931.
7. Judgment.
8. Stipulation and order extending time for bill of exceptions.
9. Bill of exceptions.
10. Assignment of errors.
11. Petition for appeal.
12. Order allowing appeal.
13. Stipulation and order for transmission of exhibits to the United States Circuit Court of Appeals.
14. Stipulation for diminution of record.
15. Citation.
16. Clerk's certificate.
17. This praecipe.

Dated this 18th day of February, 1932.

GEO. J. HATFIELD,
United States Attorney,
LUCAS E. KILKENNY,
Asst. United States Attorney,
Attorneys for Plaintiff.

Service of the within Praecipe by copy admitted this 18th day of February, 1932.

HENLEY C. BOOTH, and
A. G. GOODRICH,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 18, 1932. [70]

(Title of Court and Cause)

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 70 pages, numbered from 1 to 70, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $11.60; that said amount has been charged against the United States and the original Citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 2nd day of March, A. D. 1932.

(Seal) WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [71]

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Southern Pacific Company, and to H. C. Booth and A. G. Goodrich, its attorneys, greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein the United States of America is appellant and the Southern Pacific Company is appellee, to show cause, if any there be, why judgment rendered against the said plaintiff herein and appellant in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Frank H. Norcross, United States District Judge for the Northern District of California this 26th day of December, A. D. 1931.

FRANK H. NORCROSS,
United States District Judge for the Northern District of California, Southern Division. [72]

[Endorsed]: Filed Dec. 31, 1931.

Received copy of within Citation on Appeal, this 31st day of December, 1931.

A. G. GOODRICH,
Of Attorneys for Appellee. [72]

[Endorsed]: No. 6771. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 3, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.